

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOESTILLES DEMARCO BROOKS,

Defendant-Appellant.

UNPUBLISHED

January 28, 2000

No. 205980

Recorder's Court

LC No. 96-005710

Before: Bandstra, C.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Defendant was originally charged with assault with intent to murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), carrying a concealed weapon, MCL 750.227; MSA 28.424, and fleeing and eluding a police officer, MCL 257.602a; MSA 9.2302(1). Following a jury trial, he was acquitted of the assault charge, but convicted of CCW, felony-firearm, and fleeing and eluding a police officer. He was sentenced to concurrent terms of two years' imprisonment for the felony-firearm conviction, one to five years' imprisonment for the CCW conviction, and one to four years' imprisonment for the fleeing and eluding conviction. He appeals as of right. We affirm.

On appeal, defendant argues that his felony-firearm conviction must be vacated because he was found not guilty of both the predicate felony, assault with intent to commit murder, and the lesser offense of assault with intent to commit great bodily harm less than murder. Defendant claims that, because the jury's verdict is inconsistent, it cannot stand. We disagree.

Contrary to defendant's claim, there is no question that, in this jurisdiction, a *jury* in a criminal case may render inconsistent verdicts as between counts involving a single defendant. See *People v Torres*, 452 Mich 43, 75; 549 NW2d 540 (1996); *People v Lewis*, 415 Mich 443, 452-454; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463; 295 NW2d 354 (1980). Unlike a jury, however, a court, following a bench trial, may not render an inconsistent verdict. See *People v Burgess*, 419 Mich 305; 353 NW2d 444 (1984); *People v Williams*, 99 Mich App 463; 297 NW2d 702 (1980).

In *Lewis, supra*, the defendant was charged with second-degree murder and felony-firearm. Following a jury trial, the defendant was acquitted of the second-degree murder charge but convicted of felony-firearm. The trial court, on the defendant's motion, set aside the felony-firearm conviction, ruling that the jury could not render such an inconsistent verdict. *Lewis, supra* at 447. However, our Supreme Court reversed, holding that consistency is not required in jury verdicts on the various counts of a multi-count indictment and that a defendant charged with felony-firearm and an underlying felony need not be convicted of the underlying felony in order to be convicted of felony-firearm.

The *Lewis* case is similar to this case. Here, defendant was charged with felony-firearm and assault with intent to commit murder, a felony. Following a jury trial, defendant was convicted of felony-firearm but acquitted of the assault charge. In *Lewis*, the defendant was convicted of felony-firearm but acquitted of the second-degree murder charge. In light of the *Lewis* decision, the "inconsistency" in this case does not require that the felony-firearm verdict be set aside.¹

Contrary to what defendant argues, the *Lewis* decision was not overruled in *Burgess, supra*. Rather, *Burgess* merely distinguished a jury's ability to render an inconsistent verdict from a court's inability to do so. See also *People v Hooper*, 152 Mich App 243, 247-248; 394 NW2d 27 (1986).

We also disagree with defendant's claim that his dual convictions for felony-firearm and CCW violate the prohibition against double jeopardy. In *People v Sturgis*, 427 Mich 392, 405-406; 397 NW2d 783 (1986), our Supreme Court concluded that dual convictions for carrying a concealed weapon and felony-firearm may be obtained in the same trial growing out of the same criminal episode, as long as the felony-firearm conviction is based on a felony distinct from the concealed weapon charge. Defendant does not dispute that the felony-firearm charge in this case is based on the charge of assault with intent to commit murder, a felony distinct from the concealed weapon charge. Under these circumstances, defendant's convictions for both felony-firearm and CCW do not violate the constitutional prohibition against double jeopardy under either the United States or Michigan Constitutions. *Sturgis, supra*.

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

¹ Defendant does not challenge the sufficiency of the evidence supporting his conviction for felony-firearm. After reviewing the record, we note that any challenge in this regard would have been unsuccessful.